

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH F. ZIMMERMAN

Claimant

VS.

MARTIN MARIETTA AGGREGATES

Respondent

AND

CIGNA INSURANCE COMPANY

Insurance Carrier

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Docket No. 180,687

ORDER

ON the 8th day of February, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge James R. Ward dated December 13, 1993, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Charles Rooney of Topeka, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Ronald J. Laskowski of Topeka, Kansas. There were no other appearances.

RECORD

The record considered for purposes of this appeal includes the transcript of preliminary hearing conducted on December 9, 1993 and all exhibits attached thereto, including the video tape identified as Respondent's Exhibit No. 5, and all pleadings filed of record in this case.

ISSUES

By its appeal, respondent asked for review and decision of the following issues:

- (1) Whether claimant gave timely notice;
- (2) Whether claimant made timely written claim;
- (3) Whether claimant suffered accidental injury arising out of and in the course of his employment;
- (4) Whether the Administrative Law Judge, by his Order, ordered a change of physicians without following procedures required by amendments to the statute which became effective July 1, 1993; and
- (5) Whether the Order by the Administrative Law Judge is contrary to the evidence presented.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because the Appeals Board believes the decision on timely written claim is dispositive of this appeal, this issue will be addressed first. The Appeals Board finds, based upon the circumstances described below, claimant has failed to meet his burden of establishing that he made a timely written claim. Although originally alleged as September 25, 1992, the date of accident was amended at the preliminary hearing and was agreed to be August 25, 1992. The only compensation paid was the medical provided in the form of an appointment with Dr. O'Malley on September 16, 1992. The only evidence of a written claim is application for hearing filed in August of 1993. The evidence, therefore, does not establish that the written claim was made within 200 days after the date of accident or the last payment of compensation. See K.S.A. 44-520a.

At the hearing on this appeal, claimant's attorney offered what he contends is a written claim form submitted to the respondent within the 200 day limit. The Appeals Board does not, however, receive additional evidence. Its review is limited to the record presented before the Administrative Law Judge. K.S.A. 44-555b. This claim form was not offered at the preliminary hearing or otherwise prior to the decision by the Administrative Law Judge. There is also no evidence that the form was actually served upon the respondent.

At the hearing on appeal the parties did stipulate and agree that the Appeals Board could take judicial notice of the records of the Division of Workers Compensation for purposes of this appeal. Those records do disclose an employer's report of accident filed within 28 days of an August 25, 1992 accident. They do not, as claimant's attorney has suggested they might, include any evidence of a written claim other than the application for hearing. Therefore, the record does not disclose any written claim within 200 days from the date of accident or the last payment of benefits. Accordingly, claimant has not

established that he made timely written claim. The Appeals Board therefore, reverses the decision by the Administrative Law Judge granting benefits. Claimant's application for temporary total benefits and medical benefits is, at this time, denied.

AWARD

WHEREFORE, the decision by the Administrative Law Judge James R. Ward dated December 13, 1993 is reversed and the claimant's application for benefits is hereby denied.

IT IS SO ORDERED.

Dated this _____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Charles Rooney, 1122 SW 10th, Topeka, Kansas 66604
Ronald J. Laskowski, P.O. Box 949, Topeka, Kansas 66601-0949
James R. Ward, Administrative Law Judge
George Gomez, Director